

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY MARCEL WARLAW-BROWN,

Defendant-Appellant.

UNPUBLISHED

May 5, 2005

No. 252374

Wayne Circuit Court

LC No. 02-008857-01

Before: Wilder, P.J., and Sawyer and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of sixteen to thirty years for the second-degree murder conviction and one to five years for the felon in possession conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I

Defendant's convictions arise from the shooting death of Carl Harris. Defendant was originally tried for these offenses in October 2002, but the trial ended in a mistrial.

Defendant gave a statement to the police in which he admitted that he shot Harris while Harris was buying drugs from him, but claimed that he did so in self-defense. Defendant also told the police that his cousin, Dion Monette, was selling drugs with him, but that Monette was asleep during the altercation. Defendant testified at his 2002 trial that he shot Harris in self-defense after Harris pulled a gun on him during a drug sale. When defendant was retried for the offenses in 2003, the prosecutor read his testimony from the 2002 trial into evidence. Defendant testified at his second trial, giving substantially the same testimony as that given at the first trial.

II

Defendant claims that the trial court erred in admitting his prior testimony because the prosecutor did not timely endorse him as a prosecution witness pursuant to MCL 767.40a. At trial, defendant objected to the testimony only on the ground that it violated his Fifth Amendment privilege against compelled self-incrimination. Because defendant did not identify

MCL 767.40a as a ground for his objection at trial, this issue is not preserved. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 116; 631 NW2d 67 (2002). We review unpreserved evidentiary claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763, 597 NW2d 130 (1999); *People v Houston*, 261 Mich App 463, 466; 683 NW2d 192 (2004), lv gtd in part on other grounds 471 Mich 913 (11/4/2004).

Defendant's testimony was admissible under MRE 801(d)(2), which exempts a party-opponent's own admissions from the definition of hearsay. This Court held in *People v Thompson*, 97 Mich App 319, 322-323; 293 NW2d 812 (1980), that a defendant's testimony from a previous trial is admissible unless the defendant was "impelled" to testify because of a trial error, such as improperly admitted evidence.

MCL 767.40a requires the prosecutor to notify the defendant thirty days before trial of all witnesses the prosecutor intends to produce at trial; the prosecutor may later add witnesses upon leave of the court for good cause shown or by stipulation of the parties. *People v Callon*, 256 Mich App 312, 326; 662 NW2d 501 (2003). To determine whether this requirement applies to defendant's prior testimony, we interpret the statute's clear and unambiguous language as written. *People v Venticinque*, 459 Mich 90, 99-100; 586 NW2d 732 (1998). The statutory requirement of prior notice applies to "witnesses the prosecuting attorney intends to produce at trial." MCL 767.40a(3). Here, defendant was not a witness who the prosecutor produced at trial. He was a party-opponent, whose prior statements could be admitted pursuant to MRE 801(d)(2).¹ Because the clear and unambiguous language of MCL 767.40a precludes its application in this context, there was no plain error affecting defendant's substantial rights.

III

Defendant also claims that the trial court erroneously instructed the jury on manslaughter by replacing the words "passion" with "compassion," and "irrationally" with "rationally." Defendant's argument is based on a trial transcript that has since been amended; the amended transcript shows that the trial court used the correct words. Thus, there was no instructional error.

IV

In a pro se supplemental brief, defendant argues that his custodial statement should have been suppressed as the fruit of an illegal arrest. He asserts that the police arrested him without a warrant based only on Monette's uncorroborated, unreliable, self-serving accusation, which was insufficient to establish probable cause for a warrantless arrest. The record indicates that defendant moved to suppress his statement on the basis that it was both coerced and obtained after his request for an attorney was denied. Defendant did not challenge the validity of his arrest in the trial court. Therefore, the issue is unpreserved and appellate relief is precluded absent a plain error affecting defendant's substantial rights. *Carines, supra*. In the absence of a record establishing what facts were available to the police at the time of defendant's arrest, it

¹ He might also be considered an unavailable witness whose prior testimony was admissible under MRE 804(b)(1) (former testimony of a witness at another hearing).

follows that defendant cannot show that his arrest was plainly illegal, i.e., made without probable cause to believe that defendant committed a felony. See *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998). Therefore, we reject this claim of error.

Affirmed.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Helene N. White